



DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 948

[Doc. No. AMS-FV-11-0051; FV11-948-1 FR]

Irish Potatoes Grown in Colorado; Modification of the Handling Regulation for Area No. 3

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This rule revises the size requirements for potatoes under the Colorado potato marketing order (order). The order regulates the handling of Irish potatoes grown in Colorado, and is administered locally by the Colorado Potato Administrative Committee for Area No. 3 (Committee). This rule modifies the size requirements for handling small potatoes that measure under 1 7/8 inches in diameter. This rule allows the handling of two size ranges: 3/4 inch minimum diameter to 1 7/8 inches maximum diameter and Size B (1 1/2 to 2 1/4 inches), if such potatoes otherwise meet the requirements of the U.S. No. 1 grade. The revisions will promote orderly marketing by ensuring that only potatoes of certain similar size profiles are packed and shipped in the same container. This rule is expected to benefit the producers, handlers, and consumers of Colorado

potatoes.

EFFECTIVE DATE: December 24, 2011.

FOR FURTHER INFORMATION CONTACT: Barry Broadbent or Gary Olson, Northwest Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, Telephone: (503) 326-2724, Fax: (503) 326-7440, or E-mail: Barry.Broadbent@ams.usda.gov or GaryD.Olson@ams.usda.gov.

Small businesses may request information on complying with this regulation by contacting Laurel May, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue SW, STOP 0237, Washington, DC 20250-0237; Telephone: (202) 720-2491, Fax: (202) 720-8938, or E-mail: Laurel.May@ams.usda.gov.

SUPPLEMENTARY INFORMATION: This final rule is issued under Marketing Agreement No. 97 and Order No. 948, both as amended (7 CFR part 948), regulating the handling of Irish potatoes grown in Colorado, hereinafter referred to as the "order." The order is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), hereinafter referred to as the "Act."

The Department of Agriculture (USDA) is issuing this rule in conformance with Executive Order 12866.

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is not intended to have retroactive effect.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with USDA a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. A handler is afforded the opportunity for a hearing on the petition. After the hearing, USDA would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review USDA's ruling on the petition, provided an action is filed not later than 20 days after the date of the entry of the ruling.

This final rule revises the size requirements for small U.S. No. 1 grade potatoes handled under the Colorado Area 3 handling regulations. The rule modifies the size requirements to establish allowable size ranges for potatoes that measure less than 1 7/8 inches. This rule

allows potatoes that measure $\frac{3}{4}$ inch minimum diameter to $1\frac{7}{8}$ inches maximum diameter to be handled if such potatoes otherwise meet the requirements of the U.S. No. 1 grade. In addition, U.S. No. 1 grade Size B potatoes ($1\frac{1}{2}$ inches minimum diameter to $2\frac{1}{4}$ inches maximum diameter) are also allowed to be handled. The size requirements for U.S. No. 2 and better grade potatoes that are $1\frac{7}{8}$ inches minimum diameter and larger are not affected by this change. The rule was unanimously recommended by the Committee at a meeting on May 12, 2011. The changes are expected to enhance orderly marketing conditions and increase returns for producers and handlers.

Section 948.22 authorizes the issuance of grade, size, quality, maturity, pack, and container regulations for potatoes grown in the production area. Section 948.21 further authorizes the modification, suspension, or termination of requirements issued pursuant to § 948.22.

Section 948.40 provides that whenever the handling of potatoes is regulated pursuant to §§ 948.20 through 948.24, such potatoes must be inspected by the Federal-State Inspection Service and certified as meeting the applicable requirements of such regulations.

Under the order, the State of Colorado is divided into three separate regulatory areas for marketing order purposes. Area No. 1, commonly known as the Western Slope, includes and consists of the counties of Routt, Eagle, Pitkin, Gunnison, Hinsdale, La Plata, and all counties west thereof; Area No. 2, commonly known as the San Luis Valley, includes and consists of the counties of Saguache, Huerfano, Las Animas, Mineral, Archuleta, and all counties south thereof; and Area No. 3 includes and consists of all the remaining counties in the State of Colorado which are not included in Area No. 1 or Area No. 2. The order currently regulates the handling of potatoes grown in Areas No. 2 and No. 3 only; regulation for Area No. 1 is currently not active.

Grade, size, and maturity regulations specific to the handling of Colorado potatoes grown in Area No. 3 are contained in § 948.387 of the order's administrative rules and regulations. Prior to this action, § 948.387(a) required that all varieties of potatoes handled under the order be U.S. No. 2 or better grade and 1 7/8 inches minimum diameter or 4 ounces minimum weight, except that potatoes that meet the requirements of the U.S. No. 1 grade may be 3/4 inch minimum diameter.

The Committee met on May 12, 2011, to discuss revising the size requirements in the handling regulations. As a result of the deliberations, the Committee unanimously recommended modifying the size requirements for potatoes that meet U.S. No. 1 grade. Specifically, the Committee recommended establishing allowable size ranges for small size (under 1 7/8 inches in diameter) U.S. No. 1 grade and better potatoes. With this final rule, two allowable size ranges, 3/4 inch minimum diameter to 1 7/8 inches maximum diameter and Size B (1 1/2 inches minimum diameter to 2 1/4 inches maximum diameter), are established for potatoes that otherwise meet or exceed the minimum requirements of the U.S. No. 1 grade standard. The allowable size ranges replace the 3/4 inch minimum diameter size requirement allowance in effect prior to this action.

The Committee has observed in recent years that consumer demand has been increasing for smaller size potatoes and that those size potatoes often command premium prices. The Committee previously responded to this trend by modifying the size requirements in the handling regulations to allow for the handling of 3/4 inch minimum diameter and larger size potatoes, if the potatoes otherwise meet the requirements of the U.S. No. 1 grade.

However, the 3/4 inch minimum size requirement had no other parameters associated with it and allowed for the commingling of small size potatoes (under 1 7/8 inches in diameter) with larger size potatoes (over 1 7/8 inches in diameter).

The Committee reiterated that quality assurance is important to the industry and to consumers. Providing consistent, high quality potatoes is necessary to maintain consumer confidence. The potential for mixing small size potatoes with larger size potatoes in the same container is perceived by the Committee as being contrary to the goals of maintaining orderly marketing conditions and ensuring that only consistent, high quality potatoes from the production area enter the market. As such, the Committee felt that implementing revisions to the size requirements helps to maintain the consistency and quality of the product while still allowing the industry the maneuverability to respond to changing consumer preferences.

Final Regulatory Flexibility Analysis

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA) (5 U.S.C. 601-612), the Agricultural Marketing Service (AMS) has considered the economic impact

of this action on small entities. Accordingly, AMS has prepared this final regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf.

Based on Committee data, there are eight producers (the majority of whom are also handlers) in the regulated area and eight handlers (the majority of whom are also producers) subject to regulation under the order. Small agricultural producers are defined by the Small Business Administration (13 CFR 121.201) as those having annual receipts of less than \$750,000, and small agricultural service firms are defined as those having annual receipts of less than \$7,000,000.

According to the Committee, 981,609 hundredweight of Colorado Area No. 3 potatoes were produced for the fresh market during the 2009-2010 season. Based on National Agricultural Statistics Service (NASS) data, the average producer price for Colorado summer potatoes for that season

was \$6.90 per hundredweight. The average annual producer revenue for the eight Colorado Area No. 3 potato producers is therefore calculated to be approximately \$846,637. Using Committee data regarding each individual handler's total shipments during the 2009-2010 fiscal period and a Committee estimated average f.o.b. price for 2010 of \$9.10 per hundredweight (\$6.90 per hundredweight producer price plus estimated packing and handling costs of \$2.20 per hundredweight), none of the Colorado Area No. 3 potato handlers ship over \$7,000,000 worth of potatoes. Thus, all of the handlers and many of the producers of Colorado Area No. 3 potatoes may be classified as small entities.

This final rule makes revisions to the size requirements contained in the order's handling regulations. The rule revises the size requirements to establish two allowable size ranges - 3/4 inch minimum to 1 7/8 inches maximum diameter and Size B - if such potatoes otherwise meet the requirements of the U.S. No. 1 grade standard. The revisions promote orderly marketing by ensuring that only potatoes of a similar size profile are shipped in the same container.

The authority for regulating grade and size is provided in § 948.22 of the order. Section 948.387(a) of

the order's administrative rules and regulations prescribes the applicable size requirements.

This rule is expected to have a beneficial impact on handlers and producers by maintaining the superior reputation of the industry and ensuring that only consistent, high quality potatoes are shipped from the production area. There should be no extra cost to producers or handlers as a result of the changes because current harvesting and handling methods can accommodate the sorting of these smaller potatoes. The Committee believes that this revision will translate into greater returns for handlers and producers over time.

Neither NASS nor the Committee compiles statistics relating to the production of potatoes measuring less than 1 7/8 inches in diameter. The Committee has relied on information provided by producers and handlers familiar with the small potato market for its recommendation.

As small potatoes have grown in popularity with consumers, high quality potatoes from Colorado have been in demand. The Committee believes that modifying the size requirements for such small potatoes will help maintain their consistency and increase their quality reputation in the market. The changes are expected to increase sales of

Colorado potatoes and to benefit the Colorado potato industry. The benefits of this rule are not expected to be disproportionately greater or lesser for small entities than for large entities.

The Committee discussed alternatives to this recommendation, including taking no action on the matter. One alternative discussed was to use size ranges other than the ranges that the Committee eventually recommended. The Committee felt that the size ranges established by this rule offer the best compromise between regulatory control and accommodation of the marketing needs of the handlers. Another alternative was to establish just one $3/4$ inch to $1\ 7/8$ inches size range for small potatoes. However, that alternative was rejected because it would not have accommodated the mid-size range potatoes ($1\ 1/2$ to $2\ 1/4$ inches) that some handlers prefer to ship. Thus, the Committee unanimously agreed that their recommendation reflected the best alternative available to achieve the desired result.

In accordance with the Paperwork Reduction Act of 1995, (44 U.S.C. Chapter 35), the order's information collection requirements have been previously approved by the Office of Management and Budget (OMB) and assigned OMB

No. 0581-0178. No changes in those requirements as a result of this action are necessary. Should any changes become necessary, they would be submitted to OMB for approval.

This action does not impose any additional reporting or recordkeeping requirements on either small or large potato handlers. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies. In addition, USDA has not identified any relevant Federal rules that duplicate, overlap, or conflict with this final rule.

AMS is committed to complying with the E-Government Act, to promote the use of the Internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

In addition, the Committee's meeting was widely publicized throughout the potato industry, and all interested persons were invited to attend the meeting and participate in Committee deliberations. Like all Committee meetings, the May 12, 2011, meeting was a public meeting and all entities, both large and small, were able to

express their views on this issue.

A proposed rule concerning this action was published in the **Federal Register** on August 30, 2011 (76 FR 53842). Copies of the rule were made available by Committee staff to all Committee members and potato handlers. Finally, the rule was made available through the Internet by USDA and the Office of the Federal Register. A 60-day comment period ending October 31, 2011, was provided to allow interested persons to respond to the proposal. No comments were received. Accordingly, no changes have been made to the rule as proposed.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at:
www.ams.usda.gov/MarketingOrdersSmallBusinessGuide. Any questions about the compliance guide should be sent to Laurel May at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

After consideration of all relevant matter presented, including the information and recommendation submitted by the Committee and other available information, it is hereby found that this rule, as hereinafter set forth, will tend to effectuate the declared policy of the Act.

It is further found that good cause exists for not postponing the effective date of this rule until 30 days after publication in the **Federal Register** (5 U.S.C. 553) because handlers are already shipping potatoes from the 2011-2012 crop and handlers want to take advantage of the revisions as soon as possible. Further, handlers are aware of this rule, which was recommended at a public meeting. Also, a 60-day comment period was provided for in the proposed rule.

List of Subjects in 7 CFR Part 948

Marketing agreements, Potatoes, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, 7 CFR part 948 is amended as follows:

PART 948 - IRISH POTATOES GROWN IN COLORADO

1. The authority citation for 7 CFR part 948 continues to read as follows:

Authority: 7 U.S.C. 601-674.

2. In § 948.387, revise paragraph (a) to read as follows:

§ 948.387 Handling regulation.

* * * * *

(a) Minimum grade and size requirements—All

varieties. (1) U.S. No. 2 or better grade, $1\frac{7}{8}$ inches minimum diameter or 4 ounces minimum weight.

(2) U.S. No.1 grade, Size B ($1\frac{1}{2}$ inches minimum to $2\frac{1}{4}$ inches maximum diameter).

(3) U.S. No.1 grade, $\frac{3}{4}$ inch minimum to $1\frac{7}{8}$ inches maximum diameter.

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Dated: December 14, 2011

Robert C. Keeney
Acting Administrator
Agricultural Marketing Service

Billing code 3410-02 P

[FR Doc. 2011-32927 Filed 12/22/2011 at 8:45 am;
Publication Date: 12/23/2011]